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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1450

LANDMARK COMMUNICATIONS, INC., *Appellant*

v.

COMMONWEALTH OF VIRGINIA, *Appellee*

On Appeal From The Supreme Court of Virginia

BRIEF AMICUS CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

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INDEX

	Page
PRELIMINARY STATEMENT	1
INTEREST OF THE AMICUS CURIAE	1
QUESTIONS PRESENTED, CONSTITUTIONAL PROVISIONS INVOLVED AND STATEMENTS OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	5
Appellant's Publication Concerning the Preliminary Proceedings of the Virginia Judicial Inquiry and Review Commission Is Speech Protected Under the First Amendment	5
Under the Decisional Authorities of This Court, Va. Code § 2.1-37.13 Imposes an Illegal Prior Restraint on Publication Violative of the First Amendment	11
The Press May Not be Prohibited from Publishing Comments Concerning the Preliminary Proceedings of the Virginia Judicial Inquiry and Review Commission, Regardless of How Such Information Is Obtained	22
CONCLUSION	27

TABLE OF CITATIONS

CASES:

Bantam Books v. *Sullivan*, 372 U.S. 58 (1963)	15, 18, 20, 21, 22
Bates v. *State Bar of Arizona*, —— U.S. ——, 45 U.S. L.W. 4895 (1977)	19
Bigelow v. *Virginia*, 421 U.S. 809 (1975)	8, 19
Bridges v. *California*, 314 U.S. 252 (1941)	7
Buckley v. *Valeo*, 424 U.S. 1 (1976)	9

	Page
Cantwell v. *Connecticut*, 310 U.S. 296 (1940)	15
Carey v. *Population Services International*, 45 U.S. L.W. 4601 (1977)	8, 19
Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975)	3, 7, 8, 11
Craig v. *Harney*, 331 U.S. 367 (1947)	4, 9, 10
Curtis Publishing Co. v. *Butts*, 388 U.S. 130 (1967)	23
Elrod v. *Burns*, 427 U.S. 347 (1976)	9
Freedman v. *Maryland*, 380 U.S. 51 (1965)	15
Garrison v. *Louisiana*, 379 U.S. 64 (1964)	3
Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974)	23
Gitlow v. *New York*, 268 U.S. 652 (1975)	8
Griswold v. *Connecticut*, 381 U.S. 479 (1965)	8
Grosjean v. *American Press Co.*, 297 U.S. 233 (1936)	5, 16, 17, 21
Kunz v. *New York*, 340 U.S. 290 (1951)	15
Lewis v. *Baxley*, 368 F.Supp. 768 (M.D. Ala. 1973)	9
Linmark Associates, Inc. v. *Township of Willingboro*, —— U.S. ——, 45 U.S.L.W. 441 (1977)	19
Lovell v. *Griffin*, 393 U.S. 444 (1938)	15
Miami Herald Publ. Co. v. *Tornillo*, 418 U.S. 241 (1974)	4, 11, 21
Mills v. *Alabama*, 384 U.S. 214 (1966)	7, 9, 10, 20, 21, 22
Near v. *Minnesota*, 283 U.S. 697 (1931)	12, 13, 14, 16, 22
Nebraska Press Association v. *Stuart*, 427 U.S. 539 (1976)	10, 15, 24
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1968)	3, 10, 23
New York Times Co. v. *United States*, 403 U.S. 713 (1971)	4, 15, 19, 22
Pell v. *Procunier*, 417 U.S. 817 (1974)	2, 23, 25
Pittsburgh Press Co. v. *The Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973)	19, 22
Schenck v. *United States*, 249 U.S. 47 (1919)	4, 9
Time, Inc. v. *Firestone*, —— U.S. ——, 96 S.Ct. 958 (1976)	23
United States v. *Columbia Broadcasting System*, 497 F.2d 102 (5th Cir. 1974)	9
United States v. *Robel*, 389 U.S. 258 (1967)	8
Virginia Pharmacy Board v. *Virginia Consumer Council*, 425 U.S. 748 (1976)	19

	Page
OTHER AUTHORITIES:	
Cooley, *Constitutional Limitations* (7th ed.)	16
Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Prob. 648 (1955)	12, 14
Journal of the Continental Congress, 1904 Ed., Vol. 1	6
Schofield, *Essays on Constitutional Law and Equity*	6
Stewart, "Or of the Press", Address before the Yale Law School, Nov. 2, 1974, 26 Hastings L. Rev. 631 (1976)	26

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PRELIMINARY STATEMENT

The American Newspaper Publishers Association (hereinafter "ANPA") submits this brief *amicus curiae* in support of Appellant Landmark Communications, Inc. Both parties to this suit have given their written consent to the filing of this brief. Copies of such consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association (ANPA) is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,240 newspapers constituting over 90 percent of

the total daily and Sunday newspaper circulation, and a significant portion of the weekly newspaper circulation, in the United States. Two daily newspapers owned by Appellant Landmark Communications, Inc., as well as twenty-two other newspapers published throughout the state of Virginia, hold membership in ANPA. Concerned with issues of general significance to the profession of journalism and the newspaper publishing business, ANPA seeks to keep its members informed of, and to provide meaningful input on, matters touching on these concerns.

In that regard, the Association's member newspapers, individually and through ANPA, are ever vigilant to protect the public's right under the First Amendment to information concerning the activities of government and matters of public interest. In attempting to achieve that end, ANPA wishes to present for this Court's consideration its views as to the constitutionality of the proceedings below, which resulted in the criminal conviction of the publisher of one of its member newspapers for its truthful publication on "a matter that is both newsworthy and of great public importance." *Pell* v. *Procunier,* 417 U.S. at 830, n.7 (1974).

QUESTIONS PRESENTED, CONSTITUTIONAL PROVISIONS INVOLVED AND STATEMENTS OF THE CASE

ANPA adopts the questions presented, constitutional provisions involved and statement of the case, as set forth in Appellant's brief. ANPA strongly supports and adopts the position of Appellant herein.

Additionally, however, ANPA believes that this case involves the imposition of a prior restraint on publication and that the decision below should be reversed on that basis, as well. We can think of no clearer, more forceful deterrent to publication than the criminal sanctions set forth in the questioned statute.

SUMMARY OF ARGUMENT

The decision of the Supreme Court of Virginia below upholds the constitutionality of Virginia Code § 2.1-37.13, which authorizes criminal prosecution for the mere publication of the fact that a "Judge of a Court not of record . . . was the subject of an investigation and hearing by the Judicial Inquiry and Review Commission". Your *amicus* respectfully submits that the opinion below thereby upholds a substantial and impermissible infringement of Appellant's First Amendment rights. For it is the right and the responsibility of the press to publish truthful information on the operations and administration of state government. *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. at 491-492, 495 (1975); *New York Times Co.* v. *Sullivan,* 376 U.S. at 270 (1964); *Garrison* v. *Louisiana,* 379 U.S. at 74 (1964). Appellee asserts that a competing societal interest is served by § 2.1-37.13—that is, protecting the confidentiality of matters, preliminarily submitted to the Commission, relating to the possible imposition of disciplinary sanctions against members of the state judiciary. This salutary state interest, however, fails to overcome the First Amendment's protection of Appellant's fundamental right to publish. The publication here at issue is not "unprotected speech." Moreover, there has been no showing that the asserted interest in confidentiality is compelling or that § 2.1-37.13 is necessary to the accomplishment of such a compelling interest. Finally, there has been no express finding—

by the trial court, the Supreme Court of Virginia, or by the Virginia legislature in its enactment of the statute—that either the entire class of comments proscribed under § 2.1-37.13, or Appellant's specific publication of October 4, 1975, constituted a "clear and present danger", *Schenck* v. *United States,* 249 U.S. at 52 (1919), or "a serious and imminent threat", *Craig* v. *Harney,* 331 U.S. at 373 (1947), of a substantive evil. For these reasons alone, § 2.1-37.13 "fails to clear the barriers of the First Amendment". *Miami Herald Publishing Company* v. *Tornillo,* 418 U.S. at 241 (1974).

Beyond that, however, it is respectfully submitted that § 2.1-37.13 induces excessive caution in the publication of comment on public issues and thereby imposes a serious prior restraint on publication. As such, this statutory provision bears a heavy presumption of invalidity, *New York Times Co.* v. *United States,* 403 U.S. at 714 (1971), which cannot be overcome.

Finally, your *amicus* acknowledges that, in a very rare circumstance and if necessary to achieve a compelling state interest, a state may limit the access of the press and the public to certain sources of information. In the absence of a finding that Appellant has violated a valid criminal statute in obtaining "confidential" information concerning preliminary investigations of the Virginia Judicial Inquiry and Review Commission, there is no valid basis for punishing the act of its subsequent publication. Wherefore, Virginia Code § 2.1-37.13, both on its face and as applied to Appellant below, is unconstitutional; Appellant's conviction below must be overturned.

ARGUMENT

I. APPELLANT'S PUBLICATION CONCERNING THE PRELIMINARY PROCEEDINGS OF THE VIRGINIA JUDICIAL INQUIRY AND REVIEW COMMISSION IS SPEECH PROTECTED UNDER THE FIRST AMENDMENT

Your *amicus* respectfully submits that Appellant's publication, in the October 4, 1975 *Virginian-Pilot,* of the fact that a hearing had been conducted by the Virginia Judicial Inquiry and Review Commission concerning possible disciplinary action against a state Juvenile and Domestic Relations Court Judge clearly was speech protected under the First Amendment. The subsequent prosecution and conviction of Appellant under authority of Section 2.1-37.13 of the Code of Virginia therefore was in patent derogation of both the intent of Framers of the Bill of Rights and this Court's judicial pronouncements on the scope and application of the First Amendment. For if the enactment of the First Amendment was to serve any purpose, it was to improve upon the British system whereby the Crown sought to insulate itself from adverse comment by means of newspaper taxes, licensing laws and seditious libel, and to enlarge and expressly sanction the right of the press, and of every citizen, to comment on the operations of government:

> For more than a century prior to the adoption of the [First] amendment—and, indeed, for many years thereafter—history discloses a persistent effort on the part of the British government to prevent or abridge the free expression of any opinion which seemed to criticize or exhibit in an unfavorable light, however truly, the agencies and operations of the government. The struggle between the proponents of measures to that end and those who asserted the right of free expression was contin-

uous and unceasing. *Grosjean* v. *American Press Co.*, 297 U.S. 233, 245 (1936).

In 1774, the Continental Congress, seriously weighing the option of pursuing political independence, sent a letter to the Inhabitants of Quebec (October 26, 1774), seeking their advice and support. The Continental Congress referred to the "five great rights" and said:

> The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honorable and just modes of conducting affairs. Journal of the Continental Congress, 1904 Ed., Vol. 1, pp. 104, 108.

Thus,

> One of the objects of the revolution was to get rid of the English common law on liberty of speech and the press.
>
> • • •
>
> Liberty of the Press as declared in the First Amendment, and in the English common law crime of seditious libel cannot co-exist. Schofield, *Essays on Constitutional Law and Equity,* 521-522, 535 (1972).

And, in 1789:

> No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly and petition than the people

> of Great Britain had ever enjoyed. *Bridges* v. *California,* 314 U.S. 252, at 265 (1941).

Thus, the historical record of the intent of the framers makes it evident that the First Amendment generally was intended to protect publication by the press concerning the activities of governmental officers and agencies. This view of its intent and function has been confirmed in numerous subsequent cases decided by this Court. Speaking for the majority of the Court in *Mills* v. *Alabama,* 384 U.S. 214, at 218-19 (1966), Justice Black stated:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. . . . *Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials.* . . .

The Commonwealth of Virginia has asserted, however, that the restraint on publication imposed by § 2.1-37.13 is necessitated by the fact that "there are privacy interests to be protected in judicial [i.e., Commission] proceedings" and Virginia "must respond by means which avoid public documentation or other exposure of private information." Appellee's Motion to Affirm the Judgment of the Supreme Court of Virginia, pp. 3-4, citing *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, at 496 (1975). Of course, the mere assertion, and even existence, of a state interest in

maintaining the secrecy of preliminary proceedings before the Judicial Inquiry and Review Commission will not suffice. Given the fact that § 2.1-37.13 completely suppresses the dissemination of even truthful information about the Commission's preliminary proceedings, it abridges the freedom of speech and the freedom of the press, which are "fundamental liberties". *Gitlow* v. *New York,* 268 U.S. 652, 666 (1975). Statutes that intrude upon fundamental liberties are not given the same presumption of constitutionality which this Court usually accords to legislation. See *United States* v. *Robel,* 389 U.S. 258, 277 (1967).

> [W]here fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling,' *Bates* v. *Little Rock,* 361 U.S. 516, 524, 4 L.Ed.2d 480, 486, 80 S.Ct. 412. The law must be shown 'necessary, and not merely rationally related, to the accomplishment of a permissable state policy.' *McLaughlin* v. *Florida,* 379 U.S. 184, 196, 13 L.Ed.2d 222, 231, 85 S.Ct. 283. *Griswold* v. *Connecticut,* 381 U.S. 479, 497 (1965) (Goldberg, J., concurring opinion).

In numerous other cases, some of which also involved aspects of unconstitutional overbreadth or vagueness, a variety of assertedly "substantial" governmental interests were not found to justify a complete ban on a particular exercise of the fundamental freedoms of speech and press. See, *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975) (individual privacy); *Bigelow* v. *Virginia,* 421 U.S. 809 (1975) (the assurance of quality medical care); *Carey* v. *Population Services International,* 45 U.S.L.W. 4601 (1977) (public health and the prevention of sexual promiscuity among juveniles); *U. S.* v. *Columbia Broadcasting System,* 497 F.2d 102 (5th Cir. 1974) (maintaining a "dispassionate forum essential for a trial"); *Mills* v. *Alabama,* 384 U.S. 214 (1966) ("protection of the public from . . . propaganda in an effort to influence voters on election day"); *Lewis* v. *Baxley,* 368 F.Supp. 768, 779 (M.D. Ala. 1973) ("protection of the public from interested and improperly influenced news coverage and protection of the legislature from surreptitious lobbying by newsmen").

Moreover, in assessing the constitutional validity of a statute which abridges free speech in an attempt to preserve the fair administration of justice, "the question . . . is whether the words are used in such circumstances and are of such a nature *as to create a clear and present danger", Schenck* v. *United States,* 249 U.S. 47 at 52 (1919), or *"a serious and imminent threat* to the administration of justice". *Craig* v. *Harney,* 331 U.S. 367, 373 (1947) (emphasis added).

The burden of justifying § 2.1-37.13 therefore rests upon the Commonwealth of Virginia and not Appellant, whose First Amendment liberties are affected, *Elrod* v. *Burns,* 427 U.S. 347, 362 (1976) (plurality opinion), and the standard of review to be applied by this Court to § 2.1-37.13 is one of "exacting scrutiny". *Buckley* v. *Valeo,* 424 U. S. 1, 64 (1976).

Beyond that, in assessing whether the state interest asserted herein is sufficiently compelling to justify the substantial infringement of Appellant's fundamental liberties, caused by the application below of § 2.1-37.13,

it is important to consider that "judges are supposed to be men [and women] of fortitude, able to thrive in a hardy climate". *Craig* v. *Harney,* 331 U.S. 367, 376 (1947).

> Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. . . . Criticism of [judges'] official conduct does not lose its constitutional protection merely because it . . . diminishes their official reputation. *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1968).

ANPA does not wish to burden this Court with a recitation of the very practical and substantial interests to be served by upholding the right of the press, and of the citizens of Virginia, to comment on preliminary proceedings before the Judicial Inquiry and Review Commission. Both from the standpoint of avoiding the mistrust and suspicion bred by secret "judicial" or administrative proceedings, *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539, 587 (1976), *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 269 (1964), and in serving as an "antidote to any abuses of power by [the Commission]", *Mills* v. *Alabama, supra,* at 219, publication of the sort criminalized under § 2.1-37.13 clearly serves a function which was sought to be protected under the First Amendment.

To uphold Appellant's conviction below would only serve to expand legislative control over press freedom. By prohibiting publication of "all testimony and other evidence" of judicial impropriety received by the Commission until such time as the Commission feels it appropriate to file a "complaint" with the Virginia Supreme Court, § 2.1-37.13

> fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptable or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. *Miami Herald Publ. Co.* v. *Tornillo,* 418 U.S. 241 (1974).

The mere fact that a particular state judge is the subject of an investigation and hearing by the Judicial Inquiry and Review Commission is, regardless of the merit of the underlying charges, "an event of legitimate concern to the public and [it] consequently falls within the responsibility of the press to report the operations of government." *Cox Broadcasting Corp.* v. *Cohn, supra,* at 492 (1975).

II. UNDER THE DECISIONAL AUTHORITIES OF THIS COURT, VA. CODE § 2.1-37.13 IMPOSES AN ILLEGAL PRIOR RESTRAINT ON PUBLICATION VIOLATIVE OF THE FIRST AMENDMENT

Your *amicus* respectfully submits that the Supreme Court of Virginia erred in concluding that Va. Code § 2.1-37.13 does not impose a prior restraint upon publication. That court argued that, since the statute provides for the imposition of criminal sanctions *after* information has been divulged, the proscription fits within the "subsequent punishment" category of cases. This argument ignores the effect of statutes such as

Va. Code § 2.1-37.13 and the theory underlying the doctrine of prior restraint. Review and analysis of the cases decided by this Court demonstrates that the statute at issue, both on its face and in effect, operates as a prior restraint upon publication.

The Supreme Court of Virginia stated: "Generally, prior restraints take the form of injunctions, requirements for licenses or permits, or censorship or previous review." Appellant's Jurisdictional Statement, Appendix A at 7a. This is true when one pays due heed to the qualifying term "generally." What the Supreme Court of Virginia failed to recognize was that the statute at issue falls into a category of prior restraints which are unique in their form and have never been clearly defined by this Court. *C.f.*, Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Prob. 648, 649 (1955).

This Court first invoked and applied the doctrine of prior restraint in *Near* v. *Minnesota*, 283 U.S. 697 (1931). There, the so-called "Minnesota Gag Law" provided that any person "engaged in the business" of regularly publishing or circulating an "obscene, lewd and lascivious" or a "malicious, scandalous and defamatory" newspaper or periodical "is guilty of a nuisance." Additionally, the state was enabled to initiate suit to enjoin perpetually any person committing such a nuisance from further committing it. Pursuant to the statute, suit was initiated against the *Saturday Press* after it had published nine issues. The state court found the publication to be a "nuisance" and perpetually enjoined the defendants from issuing "any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law."

This Court held that the statutory scheme constituted a prior restraint and was an abridgement of freedom of the press, stating that the operation of the statute amounted to "an effective censorship . . ." 283 U.S. at 712. Chief Justice Hughes reviewed the historical background of the First Amendment, stressing the intention of the framers to ban the English system of licensing the press. After noting that the prohibition against prior restraint did not apply in "exceptional cases"—for example, prior restraints on incitements to violence, obscenity, and certain types of obstruction to the conduct of war—the Chief Justice framed the doctrine as follows:

> The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and, taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship. 283 U.S. at 716.

Finally, the Chief Justice noted that the doctrine protected the publication of material which might be the subject of subsequent punishment under criminal libel or other laws:

> The fact that for approximately one hundred years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals.
> 283 U.S. at 718.

Justice Butler, speaking for the four dissenters, argued that the Minnesota statute did not operate as a *previous* restraint on publication since it only operated to prevent *further* publication. Technically, Justice Butler was correct. The Minnesota statute required no original approval of a publication (*i.e.* licensing), and the injunction did not bar *all* publication. The defendants were only restrained from publishing "malicious, scandalous and defamatory" newspapers; moreover, the punishment for violating the injunction was by contempt and would only be ordered if and when subsequent offenses were committed.

> Theoretically, therefore, the statute could hardly be said to set up prior restraint. On paper, it was a system for subsequent punishment by contempt procedure.
>
> *But in practice, the system was bound to operate as a serious prior restraint.* Punishment could be summarily dispensed by a single official, without jury trial or the other protections of criminal proceedure, for infraction of a loose and illusive mandate. Under such circumstances, any publisher seeking to avoid prison would, in sheer self-protection, have to clear in advance any doubtful matter with the official wielding such direct, immediate, and unimpeded power to sentence. The judge would, in effect, become a censor.
>
> *Thus, the Court made clear that it was not interpreting the concept of prior restraint on a narrow legalistic or historical basis. It was, as it said, testing the statute by its "operation and effect."*
>
> Emerson, *supra* at 654-55. (emphasis supplied).

Since *Near*, this Court has applied the doctrine of prior restraint on numerous occasions. Confusion has

arisen, however, as to when the doctrine is applicable because only in certain categories of cases has the Court consistently stated, in explicit language, that the basis for decision was the doctrine of prior restraint. Beginning with *Lovell* v. *Griffin*, 303 U.S. 444 (1938), the Court routinely has analyzed municipal licensing ordinances, which require prior approval of the distribution of circulars or literature or the right to assemble, by analyzing the ordinances with reference to whether, on their face or in operation and effect, they imposed a prior restraint on expression. See, *e.g.*, *Kunz* v. *New York*, 340 U.S. 290 (1951) (prosecution for meeting without discretionary permit invalid); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) (ordinance requiring discretionary permit for religious or charitable solicitation invalid). Similarly, the Court has expressly invoked the doctrine where communication is sought to be prohibited through resort to injunctions or other judicial processes. See, *e.g.*, *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, (1976) (court order barring press comment on pending criminal proceedings held invalid); *New York Times Co.* v. *United States*, 403 U.S. 713 (1971) (injunction barring publication of classified government documents denied). In cases involving restrictions on the distribution and/or display of possibly obscene materials, the Court has invoked the doctrine to invalidate statutes which prevent publication, display or circulation, at least where the statutes contain no adequate procedural safeguards. See, *e.g.*, *Freedman* v. *Maryland*, 380 U.S. 51 (1965) (statute requiring approval prior to showing motion picture invalidated); *Bantam Books* v. *Sullivan*, 372 U.S. 58 (1963) (procedures of state commission amounting to system of informal censorship held violative of First Amendment).

Thus, in the above categories of cases, the Court has consistently and explicitly utilized the doctrine of prior restraint in determining the constitutionality of the statutes, rules or regulations at issue. But the above categories do not exhaust the kinds of cases to which the doctrine is applicable. To understand the full application of this doctrine, it is necessary to constantly bear in mind the test enunciated by Judge Cooley, so frequently cited by this Court:

> The mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications, . . . Their purpose [of the free-speech clauses] has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. . . . *The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.* (emphasis supplied) Cooley, *Constitutional Limitations* (7th ed.) pp. 603-04.

A few years after *Near* v. *Minnesota, supra,* this Court decided *Grosjean* v. *American Press Co.,* 297

U.S. 233 (1936), and held that a license tax for the privilege of engaging in business, imposed on advertising revenues, was an unconstitutional abridgement of freedom of the press. The Court reviewed the history of press censorship in England prior to the adoption of the Bill of Rights in this country and noted that the tax at issue was little different from the "taxes on knowledge" which England had used to suppress the dissemination of information. The Court concluded that the framers of the First Amendment, being aware of the English experience and the resultant theory of Blackstone that "freedom of the press" meant only immunity from previous censorship, did not intend such a restrictive coverage to be applied to freedom of the press. Although the Court did not specifically refer to the Louisiana tax as a "prior restraint," it is instructive to note that heavy reliance was placed on *Near* v. *Minnesota,* the Court observing:

> The conclusion there [in *Near*] stated is that the object of the constitutional provisions was to prevent previous restraints on publication; *and the court was careful not to limit the protection of the right to any particular way of abridging it.* 297 U.S. at 249 (emphasis supplied).

In light of the Court's conclusion that the Louisiana tax was a "deliberate and calculated device . . . to limit the circulation of information . . .," and its reliance on *Near* and the language of Judge Cooley, there can be little doubt but that *Grosjean* broadened the doctrine of prior restraint and made it applicable to any laws or systems of regulation which are intended, or in effect, suppress the dissemination of information.

The theory that a statutory or regulatory scheme which has the effect of suppressing the circulation or

publication of information constitutes a prior restraint was reiterated in *Bantam Books* v. *Sullivan*, 372 U.S. 58 (1963). There, the Rhode Island legislature created a commission with responsibility to educate the public as to publications "tending to the corruption of youth" and to investigate and recommend the prosecution of violations of the laws applicable thereto. The commission engaged in the routine practice of notifying distributors of publications, placed on the lists of publications, which the commission had found to be objectionable; such lists were also provided to law enforcement agencies, and the distributors were made aware of this fact. The trial court found, as facts, that such notices had the effect of intimidating the distributors, of causing the distributors to withdraw the listed publications from sale, and of suppressing the sale and distribution of such publications. 372 U.S. at 63-64. This Court held that the actions of the commission constituted "a scheme of state censorship effectuated by extralegal sanctions" and imposed an illegal prior restraint on expression in violation of the First Amendment.

The teaching of *Grosjean* and *Bantam Books* is that the doctrine of prior restraint is applicable whenever a legislative act or regulatory scheme, on its face or in its operation and effect, prohibits the dissemination of information. It matters not whether this prohibition takes the form of a denial of a license to publish, an injunction against publication, or a statutory ban. If the operation and effect of the legal provisions or system at issue results in the prevention of expression, then the doctrine applies. For,

> [t]he special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment.[1]

This same "vice" was present in the proceedings below wherein petitioner suffered criminal conviction in

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[1] *Pittsburgh Press Co.* v. *The Pittsburgh Commission on Human Relations*, 413 U.S. 376, 390 (1973). In Pittsburgh Press, a commercial speech case, the majority held that a newspaper could be prevented from publishing "help-wanted" advertisements in sex-designated columns. In commenting on your *amicus'* suggestion that the order prohibiting such advertising imposed a prior restraint on expression, the majority held that the order did not endanger "protected" speech since the speech at issue was held by the Court to be illegal. It is arguable that the order in *Pittsburgh Press* merely regulated the manner in which certain expression could be presented and, therefore, did not constitute a prior restraint.

Subsequent to *Pittsburgh Press*, this Court has considered several commercial speech cases. *Bates* v. *State Bar of Arizona*, —— U.S. ——, 45 U.S.L.W. 4895 (1977); *Carey* v. *Population Services International*, —— U.S. ——, 45 U.S.L.W. 4601 (1977); *Linmark Associates, Inc* v. *Township of Willingboro*, —— U.S. ——, 45 U.S.L.W. 4441 (1977); *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975). In those cases challenges to laws and regulations which absolutely prohibited certain kinds of expression were upheld on the basis that the prohibitions were violative of the First Amendment. Although the Court did not refer to these prohibitions as prior restraints, it well could have. Indeed, the Court's approach to these cases is similar to that utilized in cases in which the Court has explicitly recognized the doctrine of prior restraint to be applicable. In *Bates*, for example, the Court seemingly assumed that the disciplinary rule, prohibiting advertising by attorneys, came before the Court "bearing a heavy presumption of invalidity," *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971), when it recognized that "the disciplinary rule serves to inhibit the free flow of commercial information," and stated: "The choice between the dangers of suppressing information and the dangers arising from its free flow was seen as precisely the choice 'that the First Amendment makes for us.'" 45 U.S.L.W. at 4899. [citation omitted].

the absence of any evidence showing a clear and present danger to a legitimate state interest.

Bantam Books illustrates the "excessive caution" and suppression of constitutionally protected speech which flow from indirect systems of prior restraint. The same result also may be achieved by direct means, such as Va. Code § 2.1-37.13. Such statutes may appear to fall into the "subsequent punishment" category. Nevertheless this Court has previously analyzed such statutes in a manner consistent with those cases wherein the Court expressly acknowledged that the doctrine of prior restraint was applicable.

Mills v. *Alabama,* 384 U.S. 214 (1966), presented the question of whether a state could make it a crime for a newspaper editor to publish an editorial on election day urging the people to vote in a certain way. Mills had been convicted of publishing such an editorial in violation of the Alabama Corrupt Practices Act. This Court found the criminal law to be an "obvious and flagrant abridgement of the constitutionally guaranteed freedom of the press." 384 U.S. at 219. After noting that "a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs," the Court addressed the censorious effect of the law in language which clearly has its genesis in the doctrine of prior restraint:

> Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free. The Alabama Corrupt Practices Act by providing criminal penalties for publishing editorials such as the one here silences the press at a time when it can be most effective. 384 U.S. at 219.

It is also significant that the law in question had demonstrably affected the free flow of information; subsequent to the prosecution of Mills, there had been no editorial comment on election day. 283 U.S. at 221 (dissenting opinion of Douglas, J.).

Miami Herald Publishing Co. v. *Tornillo,* 418 U.S. 241 (1974), presented the opposite situation to that in *Mills.* In *Tornillo,* a Florida statute required a newspaper to provide to political candidates, whom the newspaper had criticized, equal space to reply; failure to comply with the statute was punishable as a crime. On appeal, this Court held the Florida statute to be unconstitutional, stating:

> The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. *Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. Grosjean* v. *American Press Co.* 297 U.S. 233, 244-245, 80 L.Ed. 660, 56 S Ct 444 (1936). 418 U.S. at 256 (emphasis supplied).

That the Court considered the Florida statute to be no different from a prior restraint is evident especially in light of the Court's expressed concern that the Florida statute would suppress political debate.

Grosjean, Bantam Books, Mills and *Tornillo,* when taken together, demonstrate this Court's commitment to the proposition that laws or regulatory systems which, in operation and effect, suppress freedom of expression fall within the broad doctrine of prior re-

straint first enunciated in *Near* v. *Minnesota,* 283 U.S. 697 (1931). The instant case is no different. Indeed, it is almost identical to *Mills* v. *Alabama*—both cases involve statutes which bar the publication of designated information, and in both cases criminal penalties may be imposed solely on the basis of the content of the publication. No opportunity is afforded for a determination of whether the communication is protected under the First Amendment prior to the suppression of the communication. *C.f., Bantam Books, supra* at 70-71; *Pittsburgh Press, supra* at 390.

Your *amicus* respectfully submits that Va. Code § 2.1-37.13, in its operation and effect, imposes a prior restraint upon the publication of comment upon public officials and public issues—expression which is protected speech—and that this Court should address the constitutionality of the Virginia statute with reference to the doctrine of prior restraint. As a prior restraint, the statute comes before this Court with a heavy presumption of invalidity, *New York Times Co.* v. *United States,* 403 U.S. 713, 714 (1971), and there is no constitutional basis, in the present case, upon which that presumption can be overcome.

III. THE PRESS MAY NOT BE PROHIBITED FROM PUBLISHING COMMENTS CONCERNING THE PRELIMINARY PROCEEDINGS OF THE VIRGINIA JUDICIAL INQUIRY AND REVIEW COMMISSION, REGARDLESS OF HOW SUCH INFORMATION IS OBTAINED

Your *amicus* agrees that in the presence of a compelling interest, it may be permissible for the state to attempt to preserve the confidentiality of certain information by limiting the access of the press to the

sources of such information.[2] *Pell* v. *Procunier,* 417 U.S. 817, 834 (1974). ANPA strongly asserts, however, that it is unconstitutional to prohibit, on pain of criminal sanctions, the publication of information concerning the conduct of public officials once such information has been disclosed to the press.

As noted above, publication of information concerning the conduct of judges is speech protected under the First Amendment and is clearly distinguishable from the type of publication which this court held in *New York Times Co.* v. *United States,* 403 U.S. 713 (1971) could constitutionally be prohibited by statute. Your *amicus* does not dispute that where the publication of information poses a serious and imminent threat to national security, the publication of such information may be constitutionally proscribed. No such compelling state interest exists in the case before the court. The primary interest which Virginia Code § 2.1-37.13 seeks to protect, is the reputational interest of public officials—an interest which does not weigh heavily when balanced against the public's First Amendment right to information concerning the conduct of government. *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964); *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967); *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974); *Time Inc.* v. *Firestone,* —— U.S. ——, 96 S.Ct. 958 (1976).

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[2] Your *amicus* has consistently taken the position that the public has a right of access to the source of information concerning the criminal justice system. The press' right of access to such sources proceeds from the right of the public since it is the function of a free press to gather and disseminate information of importance to the public because no individual can possibly learn all that transpires in a complex modern society. It is ANPA's position that as a matter of policy, and as a matter of law, those involved in the judicial system, particularly law enforcement officers, should not be prohibited from releasing such information.

Recent decisions of this Court establish the principle that the press may not be prohibited from publishing comments concerning the operation of the judicial system, regardless of how such information is obtained. In *Nebraska Press Association* v. *Stuart,* 427 U.S. 539 (1976), this Court, in a unanimous decision, struck down a judicially imposed gag order which prohibited the press from commenting on a criminal trial. Your *amicus* asserts that the legislatively imposed, continuing gag order embodied in Va. Code § 2.1-37.13 is a similar prior restraint on publication. Justice Brennan's concurring opinion in *Nebraska Press Association* explicitly states that the publication of information concerning the "operation of the criminal justice system" cannot be constitutionally prohibited under any circumstances.

> Settled case law concerning the impropriety and constitutional invalidity of prior restraints on the press compels the conclusion that *there can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or the operation of the criminal justice system, no matter how shabby the means by which the information is obtained.* 427 U.S. at 570 (Brennan, J. concurring) (emphasis supplied).

Justice Brennan points out that though the press cannot be enjoined from reporting certain information the press is not necessarily immunized from civil liability for libel or invasion of privacy or from criminal liability for transgressions of general criminal laws *committed in the course of obtaining that information. Id.,* n.15.

The case before this Court does not involve punishment for obtaining information by illegal means. This

case presents the question of the legality of a statutory gag order which prohibits the publication of information regardless of how such information was obtained. Justice Brennan's opinion indicates that the First Amendment affords unconditional protection against such a statutory prohibition.

A second recent decision of this Court supports the the proposition that the press may not be prohibited from publishing information concerning the operation of the criminal justice system though the press may have no constitutional right of access to the information in the first instance. In *Pell* v. *Procunier,* 417 U.S. 817 (1974), this Court upheld prison regulations which restricted access of the press to prisoners for the purpose of conducting interviews. While noting that the press is generally excluded from grand jury proceedings, from the conferences of the United States Supreme Court, and from the meetings of certain official bodies meeting in executive session, Mr. Justice Stewart's opinion stated:

> [A] journalist is free to seek out sources of information not available to the general public, that he is entitled to some constitutional protection of the confidentiality of such sources, *cf. Branzburg* v. *Hayes* [408 U.S. 665 (1972)], and that government cannot restrain the publication of news emanating from such sources. *cf. New York Times Co.* v. *United States, supra.*

The language cited above gives recognition to the principle that although there may be no "constitutional right of access to particular government information, as to require openness from the bureaucracy . . . the press is free to do battle against secrecy and deception in government" and that "the press may publish what

it knows, and may seek to learn what it can." Stewart, "Or of the Press," Address before the Yale Law School, Nov. 2, 1974, 26 Hastings L.Rev. 631 (1976).

There can be little doubt in light of recent American political history that disclosure of confidential information is critical in the explanation of public policy by government officials, and to the flow of information to the public from individuals within government. Confidential communications have proven indispensable in revealing criminal activity and mismanagement within government. In other circumstances, such communications may be viewed as appeals to public opinion where a matter of public policy is being decided in secret. Confidential communications open decisions to public scrutiny, activating the interaction among pluralistic forces which is the essence of a democratic society. Legislative bodies, government agencies, political parties and interest groups are given the opportunity to mobilize in response. Thus, confidential communications to reporters may be viewed as playing a vital role in the functioning of our democratic system. The disclosure of confidential information by government officials rarely occurs in totalitarian countries where appeals to public opinion are of little consequence.

CONCLUSION

There is no compelling state interest in prohibiting publication of information concerning the proceedings of the Virginia Judicial Inquiry and Review Commission. On the contrary, the public has a First Amendment right to information concerning the conduct of judges, as well as any other public servant. The statutory prohibition on publication manifested in Va. Code § 2.1-37.13 is therefore repugnant to the First Amendment to the Constitution of the United States.

Accordingly, ANPA respectfully represents to the Court in light of all the foregoing, that it should overturn Appellant's conviction in the Circuit Court of the City of Norfolk and reverse the decision of the Supreme Court of Virginia below.

Respectfully submitted,

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